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IN THE

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1969.

No. [redacted] 247

JESSE EARL MILLER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner, Jesse Earl Miller, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on May 14, 1969.

OPINION BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is unreported to date, but is reproduced in the appendix to this petition (Appendix A).

JURISDICTION.

The Judgment of the Circuit Court of Appeals was entered on May 14, 1969. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1) (Appendix B).

QUESTION PRESENTED.

Whether Petitioner Miller was materially prejudiced by the joinder of five counts in the indictment returned against him and his trial on said counts over timely and repeated requests for separate trials. Pursuant to Rule 14, Federal Rules of Criminal Procedure.

STATEMENT.

Petitioner Jesse Earl Miller is one of 20 defendants jointly charged, along with eight co-conspirators, in an indictment returned March 31, 1967 in United States District Court, Western District of Missouri. The Indictment alleged a series of post office burglaries that occurred between October 31, 1964 and March 31, 1967 in Missouri, Illinois, Iowa, Indiana, Minnesota, Oklahoma, Kansas, Wisconsin, Arkansas and Tennessee.

Count I of the 37-Count Indictment asserted that petitioner Miller, along with each of the remaining defendants and co-conspirators, entered into a conspiracy in violation of 18 U. S. C., Section 371, to commit offenses in violation of 18 U. S. C. 641, 18 U. S. C. 2115 and 18 U. S. C. 1361. With regard to Count I of the Indictment, a total of 153 overt acts were alleged.

Petitioner Miller was also charged in four separate counts: Count VI, burglarizing the Post Office at Camdenton, Missouri, on February 16, 1965; Count VII, wilfully damaging government property in the Camdenton Post Office; Count XV, burglarizing the Maryville, Missouri, Post Office on May 10, 1965; Count XVI, wilfully damaging government property in the Maryville, Missouri, Post Office. Petitioner was found guilty as charged and received five-year prison terms on each of Counts I and VI, to be served concurrently, and five years on each of Counts XV and XVI, to be served concurrently with each other and concurrently with the sentences imposed on Counts I and VI, and finally ten years on Count VII to be served consecutively to the other sentences, for a total of fifteen years.

At the very outset, Petitioner Miller moved the District Court pursuant to Rule 14, Federal Rules of Criminal Procedure, to sever him from all remaining defendants

and to grant him in addition thereto three separate trials. The petitioner requested a separate trial as to Count I, wherein it was alleged that the petitioner participated in some eight post office break-ins; a separate trial as to Counts VI and VII which dealt with the post office burglary at Camdenton, Missouri, on February 16, 1965, and finally a third trial with respect to Counts VI and VII, or the Maryville, Missouri, burglary which took place on May 10, 1965. A portion of the petitioner's motion was sustained in that he was severed from the remaining defendants, however, his request for a separate trial as to the various counts was denied by Judge Elmo Hunter, United States District Court, Western District of Missouri, before whom the petitioner was originally tried, convicted, and subsequently granted a new trial as an outgrowth of what Judge Hunter felt to be an instructional error. Miller was retried before the Honorable William R. Collinson, Judge, United States District Court, Western District of Missouri, along with another defendant, one Robert Holland. Judge Collinson also denied Miller the requested relief filed by him pursuant to Rule 14, Federal Rules of Criminal Procedure, requesting three separate trials.

As the Court of Appeals noted, the conspiracy was spawned by defendants Richard Christenson and William Conway. Both Christenson and Conway testified for and on behalf of the United States, along with four of the co-conspirators who were not named as defendants. Post offices were unlawfully entered and postage and savings stamps taken and disposed of by sale to three of the named defendants, James Harvey Bradley, Donald L. Paustian and Leonard J. Taylor. Christenson asserted that he had burglarized 35 post offices, while Conway stated that he had perpetrated at least 28 post office burglaries, including some 18 along with witness Christenson.

Mr. Christenson testified that he met Petitioner Miller in a tavern in St. Louis, Missouri, during the month of.

February, 1965. Christenson stated that he invited Miller to accompany him on one post office burglary and that on February 16, 1965 he and Petitioner alone traveled to Camdenton, Missouri where they burglarized the Post Office of that rural community. The two men then drove to Manhattan, Kansas, and attempted to sell the stamps they had obtained in the Camdenton burglary to Paustian and Taylor. Paustian and Taylor, evidently, lacked funds to acquire the stolen stamps and escorted Christenson and Miller to Kansas City and introduced them to Junior Bradley, a larger fence. The stamps were then sold to Bradley for the sum of $4,400.00, which Miller and Christenson divided equally. It was during this meeting that Bradley informed both Miller and Christenson that he would purchase all of the stamps they were able to acquire.

With respect to Counts XV and XVI, Christenson stated that on May 10, 1965, he, Miller, William Conway, co-conspirators John F. Hanrahan and Richard C. Wright burglarized the postal facility in Maryville, Missouri. This testimony was corroborated by Conway, Hanrahan and Wright, all of whom testified for and on behalf of the United States.

In all, witness Christenson testified to eight post office break-ins that he had perpetrated with petitioner Miller. Two additional co-conspirators likewise testified for and on behalf of the United States, corroborating portions of Mr. Christenson's testimony. Marie Michel Christenson testified that she had accompanied petitioner Miller and her husband while they had burglarized the post offices at Sesser, Illinois; Bedford, Iowa; and Bourbon, Missouri, and Millstadt, Illinois. Charles Robert Long testified that he had assisted in the burglary of the post office at Millstadt, Illinois.

With respect to Counts VI and VII, Richard Christenson was the sole witness produced by the government at

Miller's trial. In addition to admitting 35 post office burglaries, Christenson pointed out that he had plead guilty to but two counts of the indictment that jointly charged he, petitioner Miller and some 18 others and had not at the time of petitioner's trial been sentenced. Christenson admitted that at the time of trial he was serving a sentence for a federal counterfeiting offense, that he was under sentence in the State of Missouri for the offense of burglary in the first degree and that in 1959 he received three armed robbery convictions.

Petitioner Miller did not testify in his own behalf.

REASONS FOR GRANTING THE WRIT.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

This rule was articulated in a superior fashion in **Drew v. United States**, 331 F. 2d 85, wherein the United States Court of Appeals, District of Columbia Circuit, stated:

> "The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) He may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) The jury may ac-

cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the Court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration" (p. 88).

Petitioner Miller complains most bitterly of the joinder of Counts VI and VII and the failure of the trial court to afford him a separate trial with regard to these counts that arose out of the Camdenton, Missouri, Post Office burglary that resulted in petitioner's being sentenced to serve a ten-year term consecutive with the sentences imposed with regard to the remaining three counts. A fair analysis of the evidence surrounding the Camdenton episode argues strongly in support of the position urged by the petitioner. Witness Christenson was the sole source of the government's evidence adduced against petitioner with regard to the burglary of the Camdenton, Missouri, Post Office. With respect to the remaining three counts, both the conspiracy count and the Maryville, Missouri, count, a total of five witnesses who were either co-defendants or co-conspirators, in addition to Mr. Christenson, testified against petitioner Miller. It is urged most strongly that a far different result and entirely different defense trial tactics would have been employed in the trial of the Camdenton, Missouri, burglary, if such trial were to have been afforded the petitioner on a separate basis. It would pit this petitioner against an individual who admits burglarizing some 35 post offices and, in addition thereto, has been convicted of counterfeiting, three armed robberies, and burglary in the first degree.

It is strongly urged that the petitioner's position falls squarely within the teachings in the **Drew** opinion recited herein. The appearance of six witnesses, as was the case, as against the appearance of one witness certainly confounded and convicted the petitioner. It is also worthy of mention to point out that it is an understatement to say that there was a reasonable possibility that a latent feeling of hostility may have been engendered in the jury as a result of their having heard an overwhelming amount of testimony concerning lawless activities.

The facts of this case indicate that at the time of the Camdenton, Missouri, burglary in February of 1965, neither Christenson nor petitioner Miller knew of the existence of one Junior Bradley who was shown to be the principal fence for items obtained in postal burglaries. It was after the Camdenton experience that Bradley was located and indicated a willingness to purchase any additional stamps acquired by Christenson and Miller thus further rendering this offense factually separate and distinct.

Petitioner also relies upon **Cross v. United States**, 335 F. 2d 987, United States Court of Appeals, District of Columbia Circuit, where Chief Judge Bazelon stated:

> "We need not decide whether the joinder here of two offenses and two defendants was proper under Rule 8 of the Federal Rules of Criminal Procedure because we think that, in any event, severance of the counts for trial was required by Rule 14. . . . Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: The evidence against him, the availability of defense evi-

dence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus, he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his expressed denial in the other. Thus, he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decide whether this invades his constitutional right to remain silent, since we think it constitutes prejudice within the meaning of Rule 14" (pp. 988, 989).

Petitioner Miller found himself at the trial of five joined counts, in precisely the situation deemed prejudicial in the **Cross** case. This position was made clear before both trial judges and before the United States Court of Appeals for the Eighth Circuit which concluded "the result contended for— . . . three separate trials for Miller— would do violence to the letter and spirit of the law and run contrary to our conception of orderly and efficient administration of justice" (p. 8, p. 9).

It is urged that the Court of Appeals has erred in its desire to afford the parties the economy of a single trial. Petitioner Miller could simply not receive a fair trial with the joinder of counts that has taken place in the instant proceeding. If any real meaning is to be attached to Rule 14, its spirit and letter have been violated herein.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals
For the Eighth Circuit.

No. 19,230.

Jesse Earl Miller,
Appellant,
vs.
United States of America,
Appellee.

No. 19,271.

Robert Holland,
Appellant,
vs.
United States of America,
Appellee.

Appeals from the United States District Court for the Western District of Missouri.

[May 14, 1969.]

Before Matthes, Mehaffy and Lay, Circuit Judges.

Matthes, Circuit Judge.

Appellants are two of twenty defendants who were jointly charged with committing numerous burglaries of United States post offices and other offenses related to the burglaries by indictment filed on March 31, 1967, in the United States District Court, Western District of Missouri. The 37 count indictment alleged that post offices had been

burglarized between October 30, 1964, and March 31, 1967, in Missouri, Illinois, Iowa, Indiana, Minnesota, Oklahoma, Kansas, Wisconsin, Arkansas and Tennessee.[1]

Count I alleged that all of the defendants, including appellants, and eight co-conspirators not named as defendants entered into a conspiracy which began in October, 1964, in violation of 18 U. S. C., § 371, to commit offenses in violation of 18 U. S. C., § 641, 18 U. S. C., § 2115 and 18 U. S. C., § 1361. Count I alleged and set forth in detail 153 overt acts which had been committed in furtherance of the conspiracy and for the purpose of effecting the unlawful objects thereof. The remaining 36 counts alleged substantive offenses.

In addition to being charged as a conspirator, appellant Miller allegedly committed four of the substantive offenses: Count VI—burglarizing the post office at Camdenton, Mo., on February 16, 1965; Count VII—wilfully damaging government property in that post office; Count XV—burglarizing the Maryville, Mo., Post Office on May 10, 1965; Count XVI—wilfully damaging government property in that post office. The appellants were jointly tried and found guilty as charged. Holland was sentenced to four years imprisonment. Miller received five-year prison terms on each of Counts I and VI, to be served concurrently and five years on each of Counts XV and XVI, to be served concurrently with each other and concurrently with the sentences imposed on Counts I and VI, and ten years on

[1] Eleven of the defendants pled guilty and some of them appeared as witnesses for the Government in the trial of appellants. Four of the defendants, in addition to appellants, were tried by juries and convicted. The charges were dismissed against two others. The record does not disclose the disposition of the charges against defendant Leland Miller but it does indicate that he was confined in the federal penitentiary at Leavenworth, Kansas, and was brought into court under proper writ to testify in the trial of defendant Bradley. Neither of the appellants testified in his own behalf and offered scant evidence in defense.

Count VII to be served consecutively to the other sentences, for a total of 15 years. Following denials of motions for a new trial, these appeals were perfected. They were consolidated in this court.

Appellant Miller made no effort in the trial to disprove the illegal acts encompassed in the four substantive counts. Neither does he contend here that he is not guilty of those offenses. Nor do the appellants take issue with the sufficiency of the Government's evidence to warrant submission of the conspiracy count. What the appellants complain of is the course pursued in trying them. They contend in major part that they were prejudiced and did not receive a fair trial because of the failure of the court to sever them and accord them separate trials. Miller also asserts that the court should have severed the counts. These and other alleged trial errors will be considered more exhaustively below.

Inasmuch as there is no direct challenge to the sufficiency of the proof, we engage in only a brief resume of the evidence which is uncontradicted aside from an abortive attempt to impeach and thus discredit the defendants who testified for the Government. The conspiracy was spawned by defendants Richard Christenson and William Conway. In a relatively short period of time it developed into a full-grown scheme which manifested itself in widespread operations having one common aim. Post offices were unlawfully entered and postage and savings stamps were purloined and disposed of by sale to three of the defendants. In the early stage of the scheme defendants Paustian and Taylor of Manhattan, Kansas, acted as fences and purchased the stolen property from the burglars. Later, Paustian and Taylor arranged for Junior Bradley to succeed them as the principal fence. Various defendants played definite parts and were participants for different periods of time. Christenson testified that he had burglarized 35 post offices; Conway stated that he had been

involved in at least 28 burglaries, including 18 with Christenson, in nine or ten states.

The evidence convincingly demonstrates that Miller joined the conspiracy in February, 1965, and knowingly aided the furtherance of it by participating in eight post office break-ins. Apparently Holland became a member in July, 1965, and was involved in two burglaries. The burglaries and the disposition of the stolen property followed a distinct pattern and formed a solid basis for the trial, submission and finding of a single conspiracy.

SEVERANCE ISSUE

Rule 8(a), Fed. R. Crim. P., specifically provides that two or more offenses may be charged in the same indictment if they are of similar character or are based on the same act or transactions or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Under Rule 8 (b) two or more defendants may be charged in the same indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. As this court, Judge Lay, stated in *Haggard v. United States,* 369 F. 2d 968, 973, *cert. denied,* 386 U. S. 1023 (1966), "Broad interpretation of Rule 8 (b) is undoubtedly encouraged in the interests of more efficient administration of criminal trials. This in no way detracts from the rights of individuals to avoid prejudicial joinder." If it appears that a defendant is prejudiced by a joinder of offenses or of defendants in an indictment or by joinder for trial together, Rule 14 authorizes the court to order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The trial court's refusal to order separate trials or grant severance, however, may be overturned only for an abuse of discretion. *Wangrow v. United States,* 399 F. 2d 106, 110 (8th Cir.), *cert. denied,* 393 U. S. 933

(1968); *Hanger v. United States,* 398 F. 2d 91, 99 (8th Cir. 1968); *White v. United States,* 395 F. 2d 170, 175-76 (8th Cir.), *cert. denied, sub. nom., Kubik v. United States,* 393 U. S. 844 (1968); *Terlikowski v. United States,* 379 F. 2d 501, 506 (8th Cir.), *cert. denied,* 389 U. S. 1008 (1967); *Butler v. United States,* 317 F. 2d 249, 264 (8th Cir.), *cert. denied, sub. nom., Benedec v. United States,* 375 U. S. 836 (1963).

On April 13, 1967, Miller moved the district court, pursuant to Rule 14, Fed. R. Crim. P., to sever him from the other defendants and grant him a separate trial. He also moved the court to grant him three separate trials: one on Count I, another on Counts VI and VII, another on Counts XV and XVI. Judge Hunter, before whom Miller's case was then pending, granted his motion to sever him from the other defendants but denied his request to sever the counts for the reason that there was no present showing of prejudice. Initially, Miller was tried alone and was found guilty by a jury on all five counts. Judge Hunter, however, on June 29, 1967, granted Miller's motion for a new trial for failure to adequately instruct the jury as to the evidence it was free to consider on each of the five counts, and because of possible error in the conspiracy instruction. In the same order Judge Hunter found no error from joinder of the five counts and the single trial. By a contemporaneous order Judge Hunter disqualified himself from hearing the case on retrial because he had read portions of the presentence investigation made after Miller had been found guilty. He thereupon transferred the case to Judge Collinson. On September 21, 1967, Judge Hunter transferred Holland's case to Judge Collinson because of common questions of consolidation, severance and discovery relative to appellant Miller's portion of the case pending before Judge Collinson.

After his case had been transferred, Miller again moved for severance of the counts. In denying the motion Judge Collinson concluded:

> "[T]he case has been tried once without a severance and the preceding trial judge specifically found that the joinder was not prejudicial after hearing all the counts tried together. All of the cases hold that the trial court shall grant a severance at any stage of a trial if prejudice does appear. The experienced trial judge who tried this case before did not find this prejudicial and this is very persuasive upon this Court."

Although Miller made no written motion for severance from his co-defendant, his counsel, who also represented Holland, orally moved for severance of the two defendants at the commencement of the trial, and again requested severance of the counts against Miller. Judge Collinson denied the motions, stating:

> "Now, the two * * * motions for severance will be denied at this time subject to being renewed under the [applicable] rules and cases * * * during the course of trial, if the Court thinks there is something prejudicial in the joinder of either of the defendants or of the counts."

At no time thereafter were the motions renewed.

Appellants' basic position is that the evidence shows as a matter of law the existence of separate conspiracies. They assert that "[t]he record indicates that there were in fact two separate and distinct conspiracies proved. One regarding the Camdenton, Missouri Post Office and the other regarding the alleged breakins and entries of post offices thereafter." From this premise they argue that the Camdenton count was divorced from the others and should have been severed. Interwoven in the argument presented is the failure to sever the conspiracy count from the substantive counts. We disagree.

Contrary to appellants' contention this case does not fall within the teachings of *Kotteakos v. United States,*

328 U. S. 750 (1964) and *United States v. Goss,* 329 F. 2d 180 (4th Cir. 1964). The *Kotteakos* Court dealt with disconnected conspiracies having no common object. This record convincingly rebuts any basis for applying the *Kotteakos* rule to this case. The *Goss* Court decided the Government had failed to prove one indispensable ingredient of a conspiracy—that the accused persons have a common aim. Here, the record cogently demonstrates the presence of that vital element. As shown above, the proscribed activities encompassed large scale and widespread operations. The defendants, Paustian, Taylor and Bradley, provided a market for the stamps and other loot. Others, including Miller, did the burglarizing and were the source of the purloined property.

The issue here was considered at length in *Isaacs v. United States,* 301 F. 2d 706 (8th Cir.), *cert. denied,* 371 U. S. 818 (1962). We recognized the firmly entrenched principle that a fraudulent scheme and conspiracy may be and usually is established by circumstantial evidence, *id.* at 724, and on the authority of *Glasser v. United States,* 315 U. S. 60, 80, reiterated that "participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances'." We further stated that where the evidence affords satisfactory proof that a conspiracy has been formed, "but slight evidence connecting a defendant therewith may still be substantial, and if so, sufficient." 301 F. 2d at 725. See also *Cave v. United States,* 390 F. 2d 58, 69 (8th Cir.), *cert. denied,* 392 U. S. 906 (1968).

This court has also recognized that a conspiracy is not necessarily born full grown and often expands by successive stages. See *Nassif v. United States,* 370 F. 2d 147, 152 (8th Cir. 1966).

It has long been the law that a conspiracy count may properly be joined with substantive counts where it is

alleged and shown that the offenses are of the same or similar character and are based upon two or more acts or transactions connected together or constituting parts of a common scheme or plan. *Schaffer v. United States,* 362 U. S. 511, 514 (1960); *Baker v. United States,* 393 F. 2d 604, 607 (9th Cir.), *cert. denied,* 393 U. S. 836 (1968); *United States v. Hensley,* 374 F. 2d 341, 352 (6th Cir.), *cert. denied,* 388 U. S. 923, *rehearing denied,* 389 U. S. 891 (1967); *United States v. Bryant,* 364 F. 2d 598, 603 (3rd Cir. 1966); *Pegram v. United States,* 361 F. 2d 820, 821 (8th Cir. 1966).

By way of summary, it is abundantly clear that (1) a single conspiracy was formed with one common aim, and (2) the appellants knowingly became active participants in attaining the objects of the scheme. Consequently, we hold that appellants were not prejudiced in the slightest by failure to sever the counts or the appellants. Two able and experienced trial judges found that this was a proper case for joinder of defendants and counts. Our analysis of the evidence leads us to conclude that this is a typical Rule 8 (a) and (b) situation. The result contended for—a separate trial for Holland and three separate trials for Miller —would do violence to the letter and spirit of the law and run contrary to our conception of orderly and efficient administration of justice.[2]

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[2] We regard it significant that appellant Miller was tried alone and found guilty on all counts in his first trial. The second jury, under cautious supervision and proper instructions not questioned here, reached the same result. On the basis of the strong evidence against appellants separate trials would in our judgment leave appellants where they now find themselves—guilty as charged.

Additionally, we find it meaningful that the court was careful to give limiting instructions to the jury surrounding the joinder of offenses and defendants. The court instructed that each defendant was charged with separate and distinct offenses and that the jury should make separate findings as to each defendant and each charge. The court also directed that a finding as to one defendant or offense should not influence the verdict as to any other defendant or offense. See *Frazier v. Cupp,* ... U. S. ... (April 22, 1969).

EVIDENTIARY MATTERS

Two procedural events are the subject of complaint. Judge Collinson denied a motion for mistrial after defendant Christenson, a government witness, voluntarily stated that during the course of his initial meeting with appellant Miller in a St. Louis tavern the bartender mentioned that Miller was a "burglar."[3]

Later, in response to an inquiry relating to disposition of some stolen stamps obtained in a burglary of the Menahga, Minnesota, Post Office by Christenson, Miller and Holland, Christenson stated: "[I]t [a few hundred dollars worth of stamps] was not worth nothing to speak of and we don't want to be driving around the country with three or four hundred dollars worth of stamps. If we got stopped with them, we got police records and . . .." Counsel for Miller and Holland made no immediate specific objection, did not request a mistrial, but asked that the jury be instructed to "disregard the last portion of this witness' testimony * * *." The court responded and granted the very relief requested, that is, it instructed the jury to disregard the testimony. Later, after the completion of Christenson's testimony, and a short recess, counsel did make a specific request for a mistrial on the basis of Christenson's latter comment about police records.

We are not inclined to hold that the court should have declared a mistrial. Beyond any doubt the statements were not invited or solicited by the prosecutor. They were uttered voluntarily and spontaneously. They did not, when viewed in context and in light of other evidence showing

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[3] On direct examination Christenson was asked what motivated him to participate in the Camdenton, Missouri, burglary with Miller. His response was:

> "I met Miller in St. Louis in a tavern through a bartender that we both knew. I didn't know him at the time, the bartender introduced me to him, but he knew I was a thief and he told me that Miller was a burglar."

The court did, however, direct the statement stricken.

that Christenson was a thief and that appellants had engaged in a series of burglaries, have any prejudicial effect. The court was quick to take action and granted all the relief able counsel requested except to deny the motion for a mistrial. The error, if any, was clearly harmless within the meaning of Rule 52 (a), Fed. R. Crim. P. See *Francisco v. United States,* ... F. 2d ... (8th Cir. May, 1969); *Wright v. United States,* 389 F. 2d 996, 999-1000 (8th Cir. 1968); *Leonard v. United States,* 386 F. 2d 423, 425 (5th Cir. 1967); *United States v. Phillips,* 375 F. 2d 75, 81 (7th Cir.), *cert. denied,* 389 U. S. 834 (1967); *Atkinson v. United States,* 344 F. 2d 97, 100-101 (8th Cir.), *cert. denied,* 382 U. S. 867 (1965). See also *Kotteakos v. United States, supra,* at 763.

The other point of an evidentiary nature relates to the action of the court in allowing the jury to examine exhibits containing Miller's signature. The Government introduced into evidence a stipulated signature of Miller. Next, it introduced U. S. Post Office savings stamp books bearing the name of "J. Miller" and "J. Mills" and Miller's alleged address. Appellant claims that the stamp books bearing the signature of "J. Miller" and "J. Mills" were never connected to appellant Miller and that allowing the jury to compare the stipulated signature to the ones on the savings stamp books would amount to qualifying the jury as handwriting experts. Appellants also contend that it was error to admit into evidence a certified copy of Miller's automobile license since it was immaterial and irrelevant to the charges pending before the jury and was never connected to any other testimony in the trial. We find the contentions wholly without merit. Our examination of the record reveals ample evidence connecting the disputed exhibits with appellant Miller. Furthermore, 28 U. S. C., § 1731 specifically provides that the admitted handwriting of any person is admissible as evidence for purposes of comparison to determine the genuineness of other handwriting attributed to such person.

PROSECUTOR'S ARGUMENT.

Finally, appellants complain of the following statement of the prosecutor in his argument: "Now, this trial has gone on for three days' worth of evidence which you have heard, and the evidence that the United States has brought to you is uncontradicted. There is no contradiction in the evidence." Appellants' attorney immediately asked for a mistrial on the grounds that the statement was an improper comment on the failure of either of the appellants to take the witness stand. The court refused the request for a mistrial, promptly and properly instructed the jury to disregard the prosecutor's remark and later in his final instruction directed the jury to draw no inference of any kind from the failure of appellants to testify.

Considering the strong and overwhelming evidence of guilt, and the corrective action of the court, we are not convinced that the prosecutor's comment affected the substantial rights of appellants. Rule 52 (a), *supra*. The case is readily distinguishable from *Griffin v. California*, 380 U. S. 609 (1965), strongly relied upon by appellants. What happened here is more analogous to remarks which came under attack and were held nonprejudicial in *United States v. Edwards*, 366 F. 2d 853, 871 (2d Cir. 1966), *cert. denied, sub. nom., Jakob v. United States*, 386 U. S. 908, and *Parness v. United States*, 386 U. S. 919 (1967); *Sterling v. United States*, 333 F. 2d 443, 447-450 (9th Cir. 1964); *United States v. Wright*, 309 F. 2d 735, 738-39 (7th Cir. 1962), *cert. denied*, 372 U. S. 929 (1963); *Homan v. United States*, 279 F. 2d 767 (8th Cir.), *cert. denied*, 364 U. S. 866 (1960). Here, in accordance with the course pursued in *Edwards*, *Sterling* and *Wright*, *supra*, Judge Collinson instructed the jury that a defendant cannot be compelled to take the witness stand and that the jurors should not permit the failure to testify to influence them in arriving at a verdict.

We conclude by paraphrasing the final paragraph of Judge Johnsen's scholarly opinion in *Homan v. United States*, 279 F. 2d at 776. We are convinced from our evaluation of the entire record that appellants have had a fair trial, that no error was committed which individually or collectively can be regarded as prejudicial in the circumstances. A reversal could not in any way promote or serve the ends of justice.

The judgments of conviction are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment.

Crim.

(Filed May 14, 1969.)

United States Court of Appeals
For the Eighth Circuit.

No. 19,230—September Term, 1968.

Jesse Earl Miller,
Appellant,

vs.

United States of America,
Appellee.

Appeal From the United States District Court for the Western District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

It is further Ordered by this Court that the defendant in the said District Court, Jesse Earl Miller, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

May 14, 1969.

APPENDIX C.

United States Court of Appeals
For the Eighth Circuit.

No. 19,230.

Jesse Earl Miller,
Appellant,
vs.
United States of America.

Appeal From the United States District Court for the Western District of Missouri.

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 23, 1969.

APPENDIX D.

United States Court of Appeals
for the Eighth Circuit.

No. 19230—September Term, 1968.

Jesse Earl Miller, Appellant, v. United States of America.	}	Appeal from the United States District Court for the Western District of Missouri.

The Court has considered a motion filed by counsel for appellant requesting that an order entered by the United States District Court for the Western District of Missouri revoking bond be set aside. Counsel for appellee United States of America has filed suggestions in opposition to appellant's motion. Being fully advised in the premises, it is now here ordered that appellant's motion to set aside the order of the District Court revoking appellant's bond be, and it is hereby, denied.

June 6, 1969.

APPENDIX E.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

Nos. 19,230 and 19,271
(Consolidated.)
Criminal.

JESSIE EARL MILLER and ROBERT HOLLAND,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court, Western District of Missouri, Southwestern Division.

APPELLANTS' BRIEF.

DANIEL P. REARDON, JR.,
216 Buder Building,
7 North Seventh Street,
St. Louis, Missouri 63101,
GA 1-6860,
Attorney for Appellants.

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

Nos. 19,230 and 19,271.
(Consolidated.)
Criminal.

JESSIE EARL MILLER and ROBERT HOLLAND,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court, Western District of Missouri, Southwestern Division.

APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

The defendants, Jesse Earl Miller and Robert Holland, were indicted by the Federal Grand Jury for the Western District of Missouri, Cause No. 2561. They were re-indicted in Cause No. 2562. They were charged with a conspiracy in breaking into United States Post Offices and stealing United States property. 153 overt acts were listed. Some of these referred to the defendant Jesse Earl Miller and a few to Holland. Counts VI and VII charged the de-

fendant Jesse Earl Miller with the Camdenton, Missouri, Post Office burglary. Counts XV and XVI concern the Maryville, Missouri, break in.

The defendant Jesse Earl Miller filed a motion for severance which was granted. He was tried and found guilty. He was granted a new trial and because both he and Robert Holland were represented by the same attorney they were tried together.

The second trial began on November 28, 1967, before the Honorable William R. Collinson at Kansas City, Missouri (Tr. 1). The jury was selected and sworn (Tr. 1). Defendant Miller had filed a motion requesting prior notification as to any scientific test that the Government would use in the trial. After the jury was sworn, the Government told Mr. Reardon that they intended to use a handwriting expert as to Miller and Holland and a fingerprint expert as to Holland (Tr. 2). Objection was raised by counsel and he asked that the proposed exhibits which were to be used by the experts be suppressed as violating the Fifth Amendment.

A motion was raised and renewed that Miller and Holland be severed, as the stronger case based on the scientific evidence against Holland would prejudice Miller (Tr. 10).

Also a motion was raised that the counts against Miller should be severed, as the conspiracy count would include the proof of eight separate Post Office burglaries which would prejudice Miller in the defense of the Camdenton burglary (Tr. 10-11).

These motions were denied subject to renewal during the trial (Tr. 12).

The government then put on its case and its witnesses testified as follows:

1. **William Summer**, a Clerk at the Camdenton Post Office, testified that on February 17, 1965, he reported to work about 6:45 A. M. and discovered a burglary. Entry was made through the back door and the two safes were torn open. The doors were torn open and the insulation was spread around the floor (Tr. 23).

2. **James Osborn**, also a Clerk at Camdenton, testified that he secured the post office the night before (Tr. 25).

3. **Jerry Eidson**, the Postmaster at Camdenton, testified that the post office was broken into, the safes were torn open and as a result had to be sold for junk. The total amount taken was $16,712.83. Apparently, no other evidence was found (Tr. 27-37).

4. **Ralph Rider**, a highway patrolman, testified that he investigated the Camdenton burglary. He found the safes peeled, two pry bars and a hammer, apparently abandoned, and one unidentifiable footprint in the insulating material. There were no fingerprints, only large prints apparently made by cotton gloves. He found no other evidence and arrested no one (Tr. 38-46).

5. **Ross Mongold**, a clerk at the Maryville Post Office, testified that he discovered a burglary of the post office on May 11, 1965, in the morning. Entry was made in the back and the safe was broken into (Tr. 50).

6. **John Miller**, a clerk at Maryville Post Office, secured the post office (Tr. 51-52).

Paul Fields, Postmaster at Maryville, notified of the burglary at five A. M. and went to the post office and found that the floor safe had been moved about 50 feet and the front door had been peeled off the safe. One pouch that had been in the safe was opened but nothing was taken (Tr. 56). Nothing was taken from the post office (Tr. 58). The vault had been dented on the front

door and there was a hole in the plaster at the side of the vault (Tr. 63).

James Rhoades, a highway patrolman, investigated the Maryville burglary. He confirmed the Postmaster's findings. He took some samples of the insulation, an Eveready flashlight and he looks for fingerprints. No other evidence was found (Tr. 69-71).

Peter Pescetto, a postal inspector, investigated the Camdenton burglary and the Maryville burglary. Nothing was found to connect any person with these burglaries (Tr. 73).

Randall Page, Postmaster at Sesser, Illinois, testified concerning of his post office on March 12, 1965. The safes had been moved and peeled open. $111.06 in cash and stamps were missing. There was $170.00 damage to the safes and approximately $4,500.00 worth of stamps taken. However, the stamps were recovered (Tr. 78). The police returned them in a No. 2 mail sack along with some burglar tools (Tr. 79).

Francis Harbour, Postmaster of Bedford, Iowa, testified about a burglary of his post office on March 13, 1965. He found that the safe had been moved and peeled open (Tr. 85). Stamps of the value of $11,151.15 were taken along with $87.51 in cash.

Donald Clayton, Postmaster of Hamburg, Iowa, testified about a burglary of his post office on May 10, 1965. The back door was pried open, the dial on the vault door was knocked off. The only loss was $182.50 needed to repair the vault (Tr. 89).

Harry Maki, Postmaster of Menahga, Minnesota, testified about a burglary of his post office on July 15, 1965. Entry was made through the rear door and the safe was peeled. The loss amounted to $374.09 (Tr. 100).

Curd Murphy, Postmaster of Bourbon, Missouri, testified about a burglary of his post office on July 23, 1965. The safe had been moved from the post office to the loading dock. Nothing was missing (Tr. 102).

Melvin Hettenhousen, a Postmaster of Millstadt, Illinois, testified about a burglary of his post office on July 25, 1965. The back doors were pried open, two safes were torn open and the loss was $134.41 cash; $395.59 revenue stamps, $360.00 bird stamps, $5,309.50 savings stamps and $9,928.58 in postage stamps. A pants leg and pry bar were recovered from the post office. A sledge hammer and several pry bars were recovered about two and a half miles from the post office inside of a No. 1 mail sack (Tr. 105-110).

Helen Seider, general manager of the Executive Motor Hotel, Kansas City, testified that as custodian of the records, she could identify as registration cards Exhibits Nos. 16 and 17 (Tr. 113).

James Newton, general manager of the Ramada Inn, Springfield, Missouri, testified that as custodian of the records he could identify as registration cards, Exhibits Nos. 15 and 15-A.

Richard Rouse, operator of Rouse's Resort, identified Exhibit 21 as a registration sheet, kept as a business record (Tr. 119).

W. L. Meeks, operator of the Rainbow Motel, Bedford, Iowa, identified Exhibits 18 and 19 as registration receipts. He then identified defendant Miller, in his opinion, as being the person who signed the register (Tr. 123-124). Meeks said Miller came in to sign the register. Two others stayed in the automobile. There was mud all over the room and two towels were missing the next morning after they had left. It was snowing the night they checked in. He did not give any testimony as to whether the exhibits were business records. Objection

was made that the foundation had not been laid but the exhibits were admitted (Tr. 127-128). The exhibits were dated March 13, 1965.

James Miller, a representative of Hertz Truck Rental in St. Louis, identified Exhibit 14 as a rental agreement signed by Donald King on July 23, 1965. There was no testimony as to whether the exhibit was a business record (Tr. 131-139).

When **Richard Christenson**, appeared as a witness, the defense conducted a voir dire examination to see if the evidence had been acquired illegally. Christenson testified on voir dire that he was a co-defendant. He had pled guilty to two counts but was not yet sentenced. He had been arrested and convicted in St. Louis and sent to Missouri State Penitentiary. Although questioned several times he had not talked about the post office burglaries until he was in the Missouri State Penitentiary. At that time he also had a federal counterfeiting charge against him and had pled guilty to it and had been sentenced. He also had a burglary charge pending in Kansas City. He talked to the postal inspectors and Mr. Riddell of the District Attorney's office and then testified before a federal grand jury in Kansas City in February of 1967. The defense moved that his statements and testimony be suppressed because he had attorneys and was under charge when he talked and he had not been given Miranda warnings (Tr. 161-162). The motion was denied.

On direct examination, he testified that he committed several post office burglaries with the defendant, Jesse Earl Miller. He said he and Miller set out to burglarize a post office in February of 1965 and drove to Camdenton, Missouri. He described the burglary in detail (Tr. 166-167) and said that afterwards they drove to Springfield and checked into the Ramada Inn. They then drove to Manhattan, Kansas, and tried to sell the stamps. They

were in turn taken to Kansas City where they were introduced to Junior Bradley, a fence. The stamps were sold for $4,400.00 with Miller and Christenson dividing the money equally. Bradley told them that he would buy all the stamps they could get. They then stayed at the Executive Motor Inn and then came to St. Louis, Missouri. He identified Exhibit 16 as Miller's signature (Tr. 170-172).

He then testified that he, his wife and Miller burglarized the post officer at Sesser, Illinois. They broke in, peeled the safe and while leaving saw an old man watching. They left the mail bag and came back. When they came back, the bag was gone. (Tr. 175-176).

Christenson also said that he and his wife and Miller broke in at Bedford, Iowa. They stayed at the Rainbow Motel. It was snowing. While he and Miller broke in his wife drove the car around town. She ran off the road and after they finished burglarizing the post they pushed her out of the ditch and went back to where they had left the mail bag (Tr. 179). After cleaning the snow and mud off of themselves and taking two of the towels at the motel, they left and went to Kansas City where they stayed at the 4 Acre Motel. Christenson identified Exhibit No. 24 as a registration certificate he signed and it was admitted over objection, without any foundation having been laid as a business record (Tr. 179-180). They then sold the stamps to Bradley for $1,725 apiece (Tr. 182).

Christenson then said that on May 10, 1965 he, Miller, Hanrahan, Conway and Wright broke into the post office at Maryville. They tried to open the vault but could not. The safe was peeled but contained nothing worth taking (Tr. 183). He, Miller and Hanrahan then drove to Hamburg, Iowa, Conway and Wright followed. They knocked the combination off the vault but could not get the door open.

Christenson, Miller and Holland went to Nevis, Minnesota, July 15, 1965 and stayed at Rouse's Resort. They then broke into the Menahga Post Office. Christenson identified the signatures on the resort's register as his, Millers' and Holland's. Over objection, the register, Exhibit No. 24, was put into evidence (Tr. 187). Since they only got $400 in stamps from the burglary they threw them away.

Christenson, his wife, Holland and Miller on July 23, 1965, went to break into the post office at Bourbon, Missouri. Christenson testified that Holland rented a truck and drove it down. Christenson and Miller broke in and rolled the safe to the dock but Holland got lost and they had to abandon the safe (Tr. 191). On July 25, 1965, Christenson, Miller and Long broke into the Millstadt Post Office, peeled the safe and took $12,300.00 worth of stamps. The next day they drove to Kansas City and sold them to Bradley (Tr. 195-197). The savings stamps were cashed by Christenson aand Holland at various banks and post offices. Christenson was arrested while doing this. Miller told Christenson that he had used his own identification in cashing some of the stamps and was worried. Objection was made to this testimony as being hearsay, immaterial and beyond the scope of the charges. It was, however, admitted into evidence (Tr. 200).

The defense also moved for a mistrial because Christenson had said of himself, Holland and Miller, "We all had police records" (Tr. 204). The relief was denied.

On cross-examination Christenson stated that he had broken into more than 35 post offices between 1964 and 1966. He was convicted of three charges of armed robbery, two burglaries, rioting and counterfeiting. His wife was a prostitute before their marriage. She was named a co-conspirator and not a defendant (Tr. 222-224). Long, a close friend of Christenson, also was named as a co-conspirator and not a defendant (Tr. 225). Hanrahan and

Wright are also named as co-conspirators and not defendants (Tr. 227).

Toby Monday, a safe expert, testified that the safes from the post office at Camdenton had been worth $445 and $425 and now were worthless. He also repaired the Maryville safe at a cost of $265.00 (Tr. 234-237).

Richard Wright testified that he was involved in five post office burglaries in 1965. He stated that he burglarized the Maryville Post Office with several other men, one of them being Jesse Earl Miller, on the 10th of May, 1965 (Tr. 240-242). He also said that with Jesse Earl Miller and others he burglarized the Post Office in Hamburg, Iowa (Tr. 244).

On cross-examination he stated that he had been convicted of a post office burglary in Gosport, Indiana and was paroled one month before this trial (Tr. 250-251). He was originally charged as a defendant in the Maryville case but the government dropped this and made him a co-conspirator (Tr. 251).

Marie Michel Christenson, the wife of Richard Christenson, and a named co-conspirator, testified that she and several others, including Jesse Earl Miller, burglarized the Post Offices at Sesser, Illinois (Tr. 256-258), Bedford, Iowa (Tr. 260), Bourbon, Missouri (Tr. 262), and Millstadt, Illinois (Tr. 263). The rest of the testimony was identical with her husband's.

On cross-examination she testified that she had been a prostitute up until 1964, one year after her marriage (Tr. 269). She was also charged with a State burglary with her husband and a federal counterfeiting charge matter which were never brought to a conclusion against her (Tr. 271).

Charles Robert Long, admitted that he helped burglarize the Post Office at Millstadt, Illinois with Miller and dis-

posed of the stamps in Kansas City (Tr. 275-281). On cross-examination he admitted burglarizing several other post offices with Christenson and others, but he was not charged as a defendant only a co-conspirator (Tr. 281-284).

Mrs. Betty Long, wife of Charles Long, agreed that she had gone to Kansas City (Tr. 288) with Mr. Miller, her husband and others.

John Francis Hanrahan, a co-conspirator, testified that he and Mr. Miller and others burglarized the Post Office in Maryville. On cross-examination he admitted a conviction in Indiana for six post office burglaries (Tr. 290-300).

William Conway testified that the Federal Government and Illinois had custody of him but that he would have a parole situation when this case was over (Tr. 303). He admitted participation with the defendant Miller in the post office burglary at Maryville (Tr. 306). On cross-examination he admitted 28 Post Office burglaries and that he had plead guilty to two counts of the indictment several months before this trial but was never sentenced (Tr. 312-316).

Donald R. King looked at the Hertz rental agreement and said that he did not sign it. He also said he had lost his billfold and identified Exhibit 29 as his signature (Tr. 334-341).

Anthony Viessman, a state trooper, said he investigated a Hertz truck abandoned near Bourbon, Missouri on July 23 or 24 of 1965 (Tr. 341-342).

The Court, upon motion by defense attorney, ruled that no testimony concerning the handwriting of defendant Miller would be allowed into the trial but it would be allowed as to Holland (Tr. 354).

Sylvester Naeger, superintendent of Cabanne branch, identified two savings stamp books and said they were

given to him on August 11, 1965 by a man who resembled Robert Holland (Tr. 359-361). Holland was identified.

Hubert F. Hogrebe, a clerk at the main Post Office in St. Louis, testified that he cashed 3 stamp books for a man using the name of William R. Holland. He could identify no one in the court room (Tr. 365-67).

Dortha Million cashed four stamp books for a man using the name of Robert Osteroff at the Palmyra State Bank. She did not identify any one (Tr. 367-368).

Harold C. Jacobs, a clerk at the Palmyra Post Office, referred a man to the State Bank because he didn't have enough money to redeem them (Tr. 370). He was suspicious and later saw a Cadillac with two men in it and he jotted the license number down. It was AM6-079 (Tr. 372-74). He identified neither defendant.

The Government, over the objection of defendant, entered into evidence a certified copy of a motor vehicle registration showing Miller owned a Cadillac with license No. AW6-079 (Tr. 378).

John Robert Gray, employed by the St. Louis Central Station Post Office, identified 8 stamp books he cashed on August 10, 1965. The name used was William R. Holland. He identified no one (Tr. 378-80).

M. D. Thompson, a clerk at the Wellston Post Office, identified two stamp books he cashed on August 11, 1965. They were signed by Robert Osteroff and William R. Holland (Tr. 382).

Fred Petty, treasurer and assistant secretary of the Wellston State Bank, identified 5 stamp books as having been cashed by a teller at his bank (Tr. 383-85).

The Court ruled that it would allow the stamp books into evidence, including those showing Miller's name and address. The defense objected (Tr. 387-88).

John Singer, a clerk from the Cabanne branch of the St. Louis Post Office, identified 3 stamp books which he cashed on August 9, 1965 (Tr. 389). Each book bore the name of J. Miller, 5622 Delmar. He identified no one and said the man who cashed them was in his late teens or early twenties (Tr. 390).

L. U. Fulton, a clerk at the Field Station Post Office, identified 3 stamp books which he cashed on August 7, 1965. They bore the name of J. Mills, 5622 Delmar, and J. Miller. The clerk checked his license number and said that the signatures compared. He could not identify any one (Tr. 391-93).

Raymond Pritchett, a clerk at the Field Station Post Office, identified 2 stamp books he cashed on August 7, 1965 (Tr. 394). They bore the name of J. Miller, 5622 Delmar. He identified no one.

Edwin Alford, a questioned document analyst for the Post Office, and an expert, testified (Tr. 397-400) that he examined the exhibits containing the known handwriting of Robert Holland and that the signature and writing on the following items were that of Robert Holland:

Exhibit 21, registration at Rouse's Resort.

Exhibit 14, Hertz rental agreement.

Exhibit 38-A and B, stamp books, Cabanne Post Office.

Exhibit 39-A, B, C, D and E, stamp books, Main Post Office.

Exhibit 40-A, B, C, D and E, stamp books at Palmyra, Missouri.

Exhibit 41-A through H, stamp books, Central Station.

Exhibit 42-A and B, stamp books, Wellston Station.

43-A through E, stamp books, State Bank & Trust Company (Tr. 401-403).

The Government then introduced and had admitted into evidence the above named exhibits as to Holland and the stamp books with Miller's name on them: Exhibit 35-A, B and C; Exhibit 36-A, B and C; and Exhibit 37-A and B. The defense objected (Tr. 431-33).

Donald Mooney, a document analyst and fingerprint examiner, was qualified as an expert and testified that the known fingerprints of Robert Holland on Exhibit 31 compared with latent fingerprints which he developed on Exhibits 39-A, a stamp book; 40-A, a stamp book, and 43-A, a stamp book (Tr. 433-437). He also identified the prints of James Arthur Wadley as having been on the stamp books (Tr. 445), and the prints of a female were also present (Tr. 445).

Over defense objections, exhibit 30, a bond which Miller signed to be released in this case, was offered into evidence, with the stipulation that it contained the genuine signature of Miller. The purpose apparently being to allow the jury to compare the handwriting on the bond and on the stamp books (Tr. 450-51).

The Government rested and the defense moved for a directed verdict. This was denied (Tr. 452-54).

The defense offered as Exhibit No. 1 the docket sheet of United States v. Richard and Marie Christenson, a counterfeiting case, and read it into evidence. It showed that Richard Christenson plead guilty and was given concurrent time, and his wife's case was never brought up for trial or plea (Tr. 455-56).

The attorneys argued the case to the jury (Tr. 458-499). During the Government's final summation, Mr. Houdek said:

"Now, this trial has gone on for three days' worth of evidence which you have heard, and the evidence that the

United States has brought to you is uncontradicted. There is no contradiction in the evidence'' (Tr. 490-91). The defense objected as this constituted a comment on the defendants' failure to testify and a mistrial was requested. The Court cautioned the jury to disregard the argument and denied the requested mistrial.

The Court's instructions were given orally (Tr. 499-524). They were objected to on various grounds (Tr. 524-528). The jury retired for deliberation and during it requested the exhibits relating to the handwriting testimony regarding Robert Holland (Tr. 530). The jury returned their verdicts (Tr. 532). The transcript does not show what they were (Tr. 532).

The defense was granted to December 20 to file motions for new trial (Tr. 534). These were filed, and on February 23, 1968 while the motions were pending the Judge sentenced Miller to 5 years on Counts I and VI, and 5 years on Count VI to run concurrently and 5 years on Counts XV and XVI to run concurrently and a sentence of 10 years on Count VII to run consecutively (Tr. 535-546).

Holland was likewise sentenced to four years for conspiracy (Tr. 546). No ruling was made on his motion for a new trial.

POINTS AND AUTHORITIES

I.

The Court Erred in Failing to Grant Defendants Separate Trials as to Each Other and as to the Substantive and Conspiracy Counts.

Rule 14 of Federal Rules of Criminal Procedure;
U. S. v. Goss, 329 F. 2d 180;
Kotteakos v. United States, 328 U. S. 750, 66 Sup. Ct. 1239, 90 L. ed. 1557;
U. S. v. Gougis, 374 F. 2d 758 (C. A. Ill. 1967);
Ingram v. United States, 272 F. 2d 567 (4th Cir. 1959);
Metheany v. United States, 365 F. 2d 90 (C. A. Arizona 1966);
Drew v. United States, 331 F. 2d 85 (1964);
Cross v. United States, 335 F. 2d 97 (1964);
U. S. v. Foster, 80 F. Supplement 479 (D. C. N. Y. 1948);
U. S. v. Gougis, 374 F. 2d 758 (C. A. Ill. 1967);
U. S. v. Barash, 266 F. Supplement 126 (D. C. N. Y. 1966);
Gregory v. United States, 369 F. 2d 189;
Sixth Amendment, U. S. Constitution;
U. S. v. Stein, 140 F. Supplement 761 (D. C. N. Y. 1956);
Krulewitch v. United States, 336 U. S. 440, 69 Sup. Ct. 716, 93 L. ed. 790.

II.

The Court Erred in Failing to Declare a Mistrial When the Government Witness, Richard W. Christenson, Volunteered That the Defendants Had Police Records.

Hodge v. United States 126 F. 2d 849, 75 U. S. App. D. C. 332 (1942);

Johnson v. United States, 63 Sup. Ct. 549, 318 U. S. 189, 87 L. ed. 704;

Atkinson v. United States, 344 F. 2d 97 (8th Cir. 1965);

Osborn v. United States, 351 F. 2d 111 (8th Cir. 1965);

U. S. v. Tomaiolo, 249 F. 2d 338 (C. A. N. Y. 1958).

III.

The Court Erred in Failing to Declare a Mistrial When the Assistant United States Attorney Argued to the Jury That the Government's Case Was Uncontradicted.

Griffin v. California, 380 U. S. 609, 85 Sup. Ct. 1229, 14 L. ed. (2) 106;

Hayes v. United States, 368 F. 2d 814 (C. A. Idaho 1966);

Langford v. United States, 178 F. 2d 48;

United States v. Johnson, 337 F. 2d 180 (4th Cir. 1964), affirmed 383 U. S. 169 (1966);

Cloud v. United States, 361 F. 2d 627 (8th Cir. 1966).

IV.

The Court in Admitting Into Evidence and Submitting to the Jury Exhibits Nos. 35-A, B and C; 36-A, B and C; 37-A and B; and 30, Concerning Defendant Miller's Handwriting and Caused and Permitted the Jury to Conduct a Private Experiment.

U. S. v. Beach, 296 F. 2d 153, 95 A. L. R. 2d 342;

U. S. v. Davidson 367 F. 2d 60 (C. A. Tenn. 1966).

ARGUMENT.

I.

The Court erred in failing to grant defendants separate trials as to each other and as to the substantive and conspiracy counts.

The defendants Jesse Earl Miller and Robert Holland were charged with conspiracy to commit the following offenses against the United States: (a) To receive, conceal and retain property of the United States of the value of excess of $100 with intent to convert said property to their own use and gain, knowing said property to have been stolen, in violation of 18 U. S. C. A. 641.

(b) To forcibly break into and attempt to break into United States Post Offices and buildings used in whole and in part as post offices, with intent to commit in such post offices and buildings in whole and part as post offices, larceny and other depradations, in violation of 18 U. S. C. A. 2115.

(c) To wilfully injure and commit depradations against property of the United States, thereby damaging said property in excess of $100, in violation of 18 U. S. C. A. 1361.

Jesse Earl Miller was listed in the indictment as committing and participating in 18 of the 153 overt acts (6 of which are alleged forcible breakings and enterings of United States Post Offices) which brought him into contact with 6 of the other 19 defendants charged in the indictment.

The defendant Jesse Earl Miller was also charged in Count 2 with forcibly breaking into the Camdenton, Missouri, U. S. Post Office and in Count 15 with forcibly

breaking into the Maryville U. S. Post Office. Further, Counts 7 and 16 charged the defendant Jesse Earl Miller with wilfully injuring and committing depradations against the property of the United States, specifically the Camdenton and Maryville Post Offices.

The date of the Camdenton, Missouri, burglary was February 16, 1965, and the forcible entry of Maryville allegedly took place on May 10, 1965.

The defendant Jesse Earl Miller had requested a severance prior to his first trial. This severance was granted. Jesse Earl Miller was tried and the verdict was set aside and a new trial ordered. The defendant Robert Holland was then joined with Jesse Earl Miller in the second trial. This occurred because they both had the same attorney and presumably it would have been more convenient for him to try both cases. However, before the trial began the defense attorney renewed his motion for a severance as to both defendants on the grounds that unless they were tried separately and unless the Counts charging the Camdenton and Maryville breakins were severed from the conspiracy Counts, they would both be prejudiced and could not receive a fair and impartial trial (Tr. 10). **Rule 14 of the Federal Rules of Criminal Procedure** states in part: "If it appears that a defendant . . . is prejudiced by a joinder of offenses . . . for trial together, the Court may order an election or separate trials of Counts . . . or provide whatever other relief justice requires."

The transcript indicates that Mr. Christenson testified (Tr. 165) that he first met the defendant Jesse Earl Miller in a tavern in St. Louis, Missouri. He suggested burglarizing a post office and asked Mr. Miller, "Do you want to go on one?" He then testified that he and Miller burglarized the Camdenton, Missouri Post Office and took the stamps ultimately to Kansas. When they could not dispose of them there they were referred to a Mr. Bradley in

Kansas City, Missouri. It was Bradley who suggested that he could accept all the stamps they could get (Tr. 170). There is nothing in the record to indicate that a conspiracy had existed before that time or that the defendant Miller was in any way aware that a conspiracy existed until he talked to Bradley. Rather, the evidence indicates that he went on **one** post office burglary with Christenson and as a result thereof they later decided in Kansas City when talking with Mr. Bradley to form a conspiracy as to other post offices. The record indicates that there were in fact two separate and distinct conspiracies proved. One regarding the Camdenton, Missouri Post Office and the other regarding the alleged breakins and entries of post offices thereafter.

Where the evidence shows a series of separate and unconnected conspiracies, with different people at different times and with different objects, it is prejudicial to join conspiracies in one action. **U. S. v. Goss**, 329 F. 2d 180. The Court citing **Kotteakos v. United States**, 328 U. S. 750, 66 Sup. Ct. 1239, 90 L. ed. 1557 (1964), stated that a conspiracy must include a common aim and in the cases cited the object of one group was not always the object of the other group. The only thing in common was the law which they were violating. This is substantially the case as reflected by the transcript concerning the Camdenton, Missouri Post Office burglary and any other burglaries that followed.

This same rule of law was followed in the case of **U. S. v. Gougis**, 374 F. 2d 758 (C. A. Ill. 1967). In this case there was a misjoinder of three defendants accused of possessing, transporting and selling narcotics. The Courts ruled and cited **Ingram v. United States**, 272 F. 2d 567 (4th Cir. 1959), as follows: "In other words, where multiple defendants are charged with offenses in no way connected and are tried together, they are prejudiced by that

very fact, and the trial judge has no discretion to deny relief." This was the situation in this trial with the Camdenton, Missouri Post Office breakin. There is nothing in the transcript to indicate that it was a part of a larger conspiracy or that Jesse Earl Miller or the defendant Robert Holland in any way knew that it was part of a larger conspiracy. In fact, defendant Robert Holland was not involved in the case at all. It was imperative that the trial judge exercise his continuing duty to provide a fair and impartial trial for the defendant. He had no discretion in the matter once it was apparent that the Camdenton, Missouri Post Office burglary was a separate and distinct offense and was not involved in the conspiracy. **Metheany v. United States**, 365 F. 2d 90 (C. A. Arizona 1966).

The Court, in **Drew v. United States**, 331 F. 2d 85 (1964), pointed out that the trial court must balance economy of joined trials with the following points prejudicial to the defendant: First, that multiple Counts and multiple defendants can confuse the defendant and hinder him from preparing a proper defense. Secondly, the jury may infer from all the testimony concerning separate crimes that the defendant has a criminal disposition. Thirdly, the jury may accumulate the evidence in their minds and find the defendant guilty of one of the counts of which he is not guilty; and finally, the recurring testimony as to separate and distinct crimes can engender a latent feeling of hostility in the jury as to the defendant. The test set out in **Drew** is whether the evidence of other crimes would be admissible in a separate trial to show a scheme and whether or not the evidence is simple and distinct so that the jury may keep the evidence of each crime and as to each defendant separate in their minds.

Here at the very least the Camdenton, Missouri count was separate and distinct from the other counts. This

count did not involve a common scheme or plan embracing the commission of two or more crimes. The testimony concerning the Camdenton, Missouri Post Office burglary would not have been admissible in a trial of the Maryville burglary, nor should it have been admissible in a conspiracy case since the conspiracy, according to the record, could not have begun until the defendants talked to Bradley, which followed the Camdenton, Missouri burglary. It is clear that neither Miller nor Christenson had even heard of Bradley at the time of the Camdenton offense.

Certainly, the evidence was not clear and distinct as to each offense charged. Witness after witness testified for the Government concerning the defendant's involvement in numerous post office burglaries. The sheer weight and volume of the testimony insured the Government a conviction. Under the **Drew** case, supra, there should have been a severance.

In his pre-trial motion, the defendant Jesse Earl Miller indicated that he wished to testify as to one of the counts charged against him. It should be obvious from the record that the charge in which he wishes to testify was in fact those counts concerning the Camdenton, Missouri burglary and destruction of property. In the case of **Cross v. United States**, 335 F. 2d 97 (1964), the Court found that the joinder of the two offenses prejudiced the defendant in that it precluded him from testifying as to one count and at the same time remaining silent as to another count. The general rule laid down by the Court was that the counts in which the defendant wished to testify and not testify be different in time, place and evidence. In this case, that was true concerning the Camdenton, Missouri burglary, the Maryville burglary and the general count of conspiracy. The Court stated that the defendant could not possibly prepare his defense properly, in that he could not weigh whether or not he should testify as to one of the counts. The Court said, at page 989: "Moreover, defend-

ant's silence on one count could be damaging in the face of his express denial of the other. Thus, he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decide whether this invades his constitutional right to remain silent, since we think it constitutes prejudice within the meaning of Rule 14."

Only the defendant Jesse Earl Miller could offer direct testimony denying the Camdenton, Missouri Post Office burglary and destruction of property, since he was the only other person allegedly present. It cannot be said that the defendant could offer alibi witnesses because it is just as probable that he did not have alibi witnesses or have an alibi. The fact remains that only he could directly testify and deny the testimony of Mr. Christenson. He was not given this opportunity because of the extremely prejudicial joinder of the Camdenton, Missouri counts with the other counts.

It should also be noted as to the defendant Holland that the Court in the **Cross** case, supra, reversed the conviction of a co-defendant because he, too, was prejudiced by the fact that the other defendant could not take the witness stand. Furthermore, if the Court has any reasonable doubt about the joinder of counts and defendants, the Court should resolve its doubt in favor of the defendants and grant a severance. **U. S. v. Foster**, 80 F. Supp. 479 (D. C. N. Y. 1948). The Court had a continuing duty throughout the trial and once the nature of the charges became apparent, the Court had no discretion. It should have granted a severance or provided other relief. **U. S. v. Gaugis**, 374 F. 2d 758 (C. A. Ill. 1967). **U. S. v. Barash**, 266 F. Supp. 126 (D. C. N. Y. 1966).

As to the severance of defendants, it has already been shown in the **Cross** case, supra, that a co-defendant was entitled to a reversal because of the improper joinder of

counts as to another defendant. Robert Holland should have been entitled to a severance from Jesse Earl Miller if the Government insisted upon trying all of the counts against Miller at the same time. The defendant Holland was not in any way involved in the Camdenton, Missouri burglary or the Maryville burglary. In addition, the evidence shows that the Camdenton, Missouri Post Office burglary was not part of the general conspiracy. Rather, according to the evidence, it was a separate and distinct conspiracy, between Christenson and Miller. The Government did not charge the defendant Holland with being part of this conspiracy, but rather it charged him with being part of a total overall conspiracy to burglarize post offices. Holland was not involved. The Camdenton, Missouri Post Office burglary was a separate and distinct offense and Holland, as a matter of right, was entitled to a severance. **Metheany v. United States**, supra.

Also, the defendant Jesse Earl Miller was prejudiced by the evidence admitted against Holland. Handwriting testimony was admitted against the defendant Holland in great detail. Although no direct testimony was entered against Jesse Earl Miller concerning handwriting, the exhibits concerning his known handwriting and exhibits allegedly having his handwriting on it, were submitted to the jury. The Government intended the jury to compare the handwriting. Certainly, the testimony of the Government's expert on handwriting could have been used to inform the jury concerning certain items they should look for in the handwriting exhibits concerning Miller. Miller was certainly prejudiced by the strong case against Holland. The Government cannot use the evidence in a strong case against either of the defendants in a weaker case, solely for the purpose of strengthening their weak case. This was especially true concerning the Camdenton, Missouri Post Office burglary. See **Gregory v. United States**, 369 F. 2d 189.

It should be noted that both defendants have the same attorney and that it could have been very difficult for him to protect the interest of both parties. Although it appears from the transcript that this was done, still the attorney properly asked for a continuance before the trial began.

Both defendants had a right to a fair and impartial jury. **Sixth Amendment, U. S. Constitution. U. S. v. Stein,** 140 F. Supp. 761 (D. C. N. Y. 1956), they did not receive a fair and impartial trial because the jury heard evidence concerning separate and distinct crimes.

Nor can it be said that the Court extricated the defendants from their predicament by instructing the jury to disregard the evidence against the other defendant when deciding the guilt of one defendant. It has already been established that normal human beings cannot completely disregard the prejudicial effects of such testimony. See **Krulewitch v. United States,** 336 U. S. 440, 69 Sup. Ct. 716, 93 L. ed. 790, wherein the Court stated: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." The defendants should have been tried separately.

II.

The court erred in failing to declare a mistrial when the government witness, Richard W. Christenson, volunteered that the defendants had police records.

William Christenson, when testifying on the Government's behalf, first referred to the defendant Jesse Earl Miller as a "burglar" (Tr. 165). This remark was objected to and the trial judge asked the jury to disregard it because it was hearsay. Christenson later in his testimony, when referring to himself and defendants Holland and Miller, stated "We all had police records"

(Tr. 188). The defense objected and asked that the jury be instructed to disregard the reference that Mr. Christenson had made to the defendants' police records. The only admonition given by the Court was as follows: "Yes, the jury will disregard it" (Tr. 189). Later the defense requested a mistrial (Tr. 204) and the Court denied the request (Tr. 205).

Generally, evidence of offenses other than the offense for which the accused is on trial is inadmissible. **Hodge v. United States**, 126 F. 2d 849, 75 U. S. App. D. C. 332 (1942), and **Johnson v. United States**, 63 Sup. Ct. 549, 318 U. S. 189, 87 L. ed. 704. A recent case on the subject is **Atkinson v. United States**, 344 F. 2d 97 (8th Cir. 1965). In this case, defendant was convicted of mail fraud and conspiracy and alleged that the Court erred in refusing to grant a mistrial because of a witness' reference to his prior conviction. In affirming a conviction, the Court of Appeals held that the trial court had an opportunity to observe the jury and the impact of the testimony upon it. The volunteered statement of the witness was inadmissible but the trial court acted promptly and sustained the objection and advised the jury to disregard the testimony. No further request was thereafter made for the Court to grant further relief or give any instructions on the matter. Whether prejudicial error has been committed must be determined on the basis of the record as a whole. In this case before us there are several differences from the **Atkinson** case. First, further relief was requested in that the defense requested a mistrial within a short time after the defense's motion to disregard was granted. Also, it should be noted that the witness had previously testified, over objection by the defense attorney, that Mr. Miller was a "burglar". This type of reference twice made and twice inadmissible, had to have a cumulative effect upon the jury. Also, the Judge's admonition to the jury was not very strong.

The judge did not emphasize or elaborate upon the inadmissibility of the testimony, but simply asked the jury to disregard it.

In the case of **Osborn v. United States**, 351 F. 2d 111 (8th Cir. 1965), where a similar point was raised, the Court pointed out the general rule that the defendant's prior conviction cannot be put before the jury, and that one of the factors to be considered in determining prejudice to the defendant is the strength of the prosecution's case. Where it is strong, as it was in the **Osborn** case, the conviction will not be reversed. Here, the Government's case, in regard to the Camdenton Post Office burglary and destruction of property, was extremely weak. The Government's case consisted only of Mr. Christenson's testimony. There was no other physical evidence or testimony to connect the defendant Jesse Earl Miller with the Camdenton Post Office burglary. In fact, an instruction was given stating that the testimony of a co-conspirator or a co-defendant or an informer, all of which Mr. Christenson was, if not corroborated by some other person implicated in the crime or other evidentiary facts, should be received with caution (Tr. 519 and 520).

The record also shows that the bulk of the testimony against Mr. Miller and Mr. Holland was provided by Government witnesses with extensive police records. It is only fair to assume that the jury would equate the most serious police records of Mr. Christenson, his wife, and the other co-conspirators, with the police record of Mr. Miller and Mr. Holland. As was stated in **Atkinson v. United States**, supra, whether prejudicial error has been committed must be determined by the record as a whole. Here the record as a whole indicates that on two occasions the police record of the defendants was referred to by Mr. Christenson. Further the record as a whole indicates that a very weak admonition was given

to the jury in both instances to disregard the testimony. And, further, the record as a whole indicates that it would be almost impossible for a jury of twelve normal people to so disregard it. This, coupled with the fact, that the Government had an extremely weak case in regards to the Camdenton Post Office burglary, indicates that the defendant Jesse Earl Miller was highly prejudiced as to the Camdenton, Missouri, burglary, and only slightly less prejudiced as to the other counts in the indictment. **U. S. v. Tomaiolo**, 249 F. 2d 338 (C. A. Ny. 1958).

III.

The Court erred in failing to declare a mistrial when the Assistant United States Attorney argued to the jury that the Government's case was uncontradicted.

On page 490 of the transcript the U. S. attorney stated: "Now, this trial has gone on for three days' worth of evidence which you have heard, and the evidence that the United States has brought to you is uncontradicted. There is no contradiction in the evidence . . .

"Mr. Reardon: Step up."

Outside of the hearing of the jury, then, Mr. Reardon objected to the U. S. Attorney's statement as being an improper comment on the failure of either of the defendants to take the witness stand and he requested a mistrial. The Court asked the U. S. attorney why he had said that and told him that mistrials had been declared on that before. The Court then instructed the jury: "Ladies and gentlemen, the remark of the District Attorney that the evidence is uncontradicted is entirely improper. The jury is the sole triers of the fact and it is up to you to determine. What his opinion is is not binding upon you in any way and you will disregard that remark. Proceed."

The Court, then (Tr. 520), instructed the jury that the law does not compel a defendant in a criminal case to take the witness stand and testify and no presumption of guilt may be raised and the jury must not permit his failure to testify to have any influence in arriving at a verdict.

The United States Supreme Court, in the case of **Griffin v. California**, 85 Supreme Court 1229, 380 U. S. 609, 14 L. ed. 2d 106, held that it was reversible error to comment upon the fact that a defendant had not taken the witness stand. The test as to whether or not the prosecutor's comment amounts to a comment upon the defendants' failure to take the witness stand is whether the language naturally and necessarily infers that he has not taken the stand. **Hayes v. United States**, 368 F. 2d 814 (C. A. Idaho 1966). A comment to the jury which is likely to suggest that the jury should draw an inference from the fact that the defendant did not testify is improper. **Langford v. United States**, 178 F. 2d 48.

A somewhat similar situation occurred in the case of **United States v. Johnson**, 337 F. 2d 180 (4th Cir. 1964), affirmed 383 U. S. 169 (1966), wherein the Court held that the prosecutor did not draw improper attention to Edlen's refusal to testify. He merely pointed out that the defense did not introduce evidence to contradict certain prosecution witnesses. The defendant was not the **only** person who could have refuted the Government's witnesses. And in the case of **Cloud v. United States**, 361 F. 2d 627 (8th Cir. 1966), the Court affirmed a conviction where the defendant complained that the instructions contained the words "satisfactorily explained" or "not satisfactorily explained" or "unexplained." Since it was unnecessary for clarity, the instruction tended to call to the attention of the jury the fact that the defendant did not testify. The Court said, "There is no mention made

of defendant's failure to testify in the instructions challenged . . . Defendant, under the instruction, could alleviate the inference arising out of possession **by the testimony of others . . .**"

It appears that the comment made by the U. S. District attorney would be prejudicial if the defendant is the **only** one who could take the stand to rebut the evidence against him.

The Camdenton, Missouri burglary and destruction of Government property was based solely and primarily upon the testimony of Mr. Christenson. He testified that he and Mr. Miller committed these crimes. His testimony did not indicate the presence of any other persons or witnesses to this crime. The only person who could directly contradict this testimony was the defendant Jesse Earl Miller. It would be simply conjecture to say that he could have had alibi witnesses. Since there was no reference to an alibi, there could be no other inference drawn from the District Attorney's remarks except the inference that the defendant Jesse Earl Miller did not take the stand and contradict the testimony of Christenson, at least insofar as the Camdenton, Missouri burglary and destruction of property was concerned.

Likewise, only the defendant Robert Holland could directly contradict the testimony of the handwriting expert as to his handwriting. Perhaps a handwriting expert could have given an expert opinion in Mr. Holland's favor, however no handwriting expert was available, as was indicated during the trial by the defense attorney. In fact, all handwriting testimony concerning Mr. Miller was struck partially for the reason that the Government did not inform the defense in sufficient time to have a handwriting expert available. In fact, only Mr. Holland could have testified and contradicted the testimony of the Government concerning his handwriting.

The U. S. attorney's comment could only have referred in these two instances to the fact that the defendants had not testified. Taking the record as a whole, the comment naturally and necessarily infers that the defendants did not testify. The comment was therefore reversible error and a mistrial should have been declared.

The instruction given by the Court does not in any way mitigate the comment on the failure of the defendants to testify. In fact the instruction is so worded as to compound the damage. The instruction states that the jury must not permit his failure to testify to have any influence in arriving at a verdict. This states in a positive way that the defendant has not in fact testified. It thereby draws the jury's attention to the fact, while at the same time requesting them to disregard the fact. It is impossible for a normal person, even when he is sitting on a jury, to completely disregard what has been so forcefully thrust before him by the prosecutor and the Judge, one in a comment, the other in an instruction. A mistrial should have been declared.

IV.

The Court in admitting into evidence and submitting to the jury Exhibits Nos. 35-A, B and C; 36-A, B and C; 37-A and B and 30 concerning defendant Miller's handwriting caused and permitted the jury to conduct a private experiment.

At page 354 of the transcript, the Court ruled that no testimony concerning the handwriting of defendant Jesse Earl Miller would be allowed into the trial. The Government, later in the trial, produced Exhibits 35-A, B and C; 36-A, B and C; and 37-A and B, all of which were United States Post Office stamp books received by United States Post Office clerks and each of which bore the name J. Miller or J. Mills (Tr. 431-433). The Court allowed these into

evidence and previously ruled (Tr. 387-388) that it would do so. The defense had stipulated that Exhibit No. 30, the bond which Mr. Miller was required to sign in order to be released from custody in this case, bore the genuine signature of Jesse Earl Miller. The exhibit was admitted by the Court (Tr. 451) with an explanation by the Court that it contained the genuine signature of Jesse Earl Miller, the defendant in this case. The defense had objected that this would amount to qualifying the jury as handwriting experts. The Court asked the question, "Can the jury pass on disputed handwriting" (Tr. 450), and after hearing the arguments of the defense and the U. S. attorney, admitted the bond into evidence. The stamp books bearing the name J. Mills and J. Miller were not connected by testimony or evidence to the defendant Jesse Earl Miller. Nor does the bond have any significant evidentiary value in the case. The only way that these exhibits can be material and relevant to the case is if the handwriting on the bond which is known to be the handwriting of Jesse Earl Miller compares and is identical to the handwriting on the Post Office stamp books. The Court barred all handwriting testimony as to Jesse Earl Miller from the trial. There was no evidence by any expert or any other person comparing the alleged handwriting. The only purpose for submitting these exhibits to the jury was to allow them to look at the exhibits and to compare the handwriting. This gave the jury permission to conduct a private experiment concerning the handwriting. This is certainly not allowed. **U. S. v. Beach**, 296 F. 2d 153, 95 A. L. R. 2d 342. Also **U. S. v. Davidson**, 367 F. 2d 60 (C. A. Tenn. 1966).

In addition, without some comparison having been made concerning these documents and some connection having been made between them and the defendant, Jesse Earl Miller, they are immaterial and are highly prejudicial to Mr. Miller.

The jury was allowed to conduct a private experiment, an experiment which they were not qualified to make, an experiment which was not in evidence, and which therefore constitutes reversible error.

It might also be noted that the Court erred in admitting Exhibit No. 47, a certified copy of Missouri Certificate of Title, showing that Missouri license No. AW6-079 was issued to Jesse Earl Miller on April 22, 1965 for a 1960 Cadillac Coupe (Tr. 378), since the certificate of title was immaterial and irrelevant to the charges pending before the jury, as it was never connected to any other testimony in the trial. Perhaps the Government wanted and intended to connect the Certificate of Title to the testimony of Harold C. Jacobs who jotted down a license number. However, the license number which he jotted down was AM6-079 (Tr. 374).

CONCLUSION.

In conclusion, both defendants respectfully request that they be granted a new trial and that the defendants be severed as to each other and as to the substantive and conspiracy counts in any such new trial granted.

Respectfully submitted,

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No. 247

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In the Supreme Court of the United States

OCTOBER TERM, 1969

JESSE EARL MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; VII R, 1-12)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1969 (Pet. App. B; VII R, 13). The petition for a writ of certiorari was filed on June

[1] The record is in seven volumes on file before this Court.

16, 1969 and is thus out of time under the Rules of this Court, Rule 22. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's motion for severance was properly denied.

RULES INVOLVED

Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may

order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. * * *

STATEMENT

Petitioner is one of twenty defendants jointly charged with committing numerous burglaries of United States post offices and other offenses related to the burglaries in an indictment filed on March 31, 1967, in the United States District Court for the Western District of Missouri. Count I alleged that the defendants (including petitioner) and eight co-conspirators not named as defendants entered into a conspiracy which began in October, 1964, in violation of 18 U.S.C. 371, to commit offenses in violation of 18 U.S.C. 641 (stealing public money), 18 U.S.C. 2115 (burglary of a post office) and 18 U.S.C. 1361 (depredation of government property). The remaining 36 counts alleged substantive offenses (I R, 1-55).

1. Petitioner was tried together with a co-defendant Holland, who was charged only in the conspiracy count (III R, 521). Petitioner, in addition to being charged as a conspirator, was charged with four substantive offenses arising out of two burglaries on February 16 and May 10, 1965.[2] Petitioner was found guilty as charged (III R, 520) and, on Febru-

[2] Count VI—burglarizing the post office at Camdenton, Missouri, on February 16, 1965; Count VII—wilfully damaging government property in that post office; Count XV—burglarizing the Maryville, Missouri, post office on May 10, 1965; Count XVI—wilfully damaging government property in that post office (I R, 29, 35).

ary 23, 1968, was sentenced to imprisonment for a total period of fifteen years.[3]

Petitioner had previously been tried alone on all five counts in which he was named, but the court had refused to order separate trials on the various counts in which he was charged. After a jury verdict of guilty, the trial judge granted a new trial because of error in the instructions, and transferred the cases of petitioner and Holland to Judge Collinson (Pet. App. A-5).

After his case had been transferred, petitioner again moved for severance of the various counts (II R, 416). In denying the motion Judge Collinson stated (III R, 454):

> [T]he case has been tried once without a severance and the preceding trial judge specifically found that the joinder was not prejudicial after hearing all the counts tried together. All of the cases hold that the trial court shall grant a severance at any stage of a trial if prejudice does appear. The experienced trial judge who tried this case before did not find this prejudicial and this is very persuasive upon this Court.

Petitioner's counsel, who also represented Holland, orally moved for severance of the two defendants at the commencement of the trial, and again requested severance of the counts against petitioner (IV R, 10-11). In denying the motions, Judge Collinson stated (IV R, 13):

---

[3] He was sentenced to imprisonment for five years on each of Counts I, VI, XV and XVI, to be served concurrently and ten years on Count VII to be served consecutively to the other sentences (III R, 622).

> Now, the two * * * motions for severance will be denied at this time subject to being renewed under the [applicable] rules and cases * * * during the course of trial, if the Court thinks there is something prejudicial in the joinder of either of the defendants or of the counts.

At no time thereafter were the motions renewed.

2. The evidence at trial showed that the conspiracy began in October 1964. Christenson and Conway, who were witnesses for the government, testified that in the period from October 1964 to February 1965 they had burglarized seven post offices and had established a fencing arrangement for disposition of stolen stamps with Paustian and Taylor of Manhattan, Kansas (IV R, 168, 212-216; V R, 308, 314).

Christenson met petitioner in St. Louis on February 16, 1965 (IV R, 165-166, 27). Christenson testified (IV R, 165):

> Miller [petitioner] and I had a short conversation after we met. He said he wanted to make some money. I said well, I needed to make some, too. I asked him if he had ever been in any post office burglaries he said no, he hadn't. I said, "Do you want to go on one?" He said, "Yeah". So we decided to leave, we left a few days later, we left St. Louis about noon one day. We drove down through—went out Route 66 and drove through eight or ten towns, looking for post offices. Finally came across one in Camdenton, Missouri, about seven or seven thirty that night. We decided to burglarize it.

After the Camdenton burglary they drove to Springfield, Missouri, registered at a motel, sorted the

stamps and money and left immediately to meet Taylor in Manhattan, Kansas, in accordance with Christenson and Conway's previous arrangements (IV R, 167-168). Christenson testified that the following conversation occurred in petitioner's presence at Taylor's pawn shop (IV R, 169):

> I told him [Taylor] we had a load of stamps and he said well, he didn't have enough money right now to buy them. He said, "At the rate you guys are stealing them"—he said, "I better take you to Kansas City and introduce you to the man that I am buying them for." So we said, "Okay".

When petitioner and Christenson met Taylor and Paustian in Kansas City, they were introduced to defendant Bradley who purchased about $16,000 worth of the stamps stolen at Camdenton and offered to continue to purchase stolen postage (V R, 169-171).

On May 10, 1965 petitioner, along with Christenson, Conway, Wright and Hanrahan burglarized the Maryville, Missouri, Post Office (IV R, 53, 182-183; V R, 241, 294-295, 306). Petitioner brought Hanrahan and Wright into the conspiracy shortly before the Maryville burglary (IV R, 230; V R, 240-241).

At various dates during March, May and July 1965 petitioner participated in burglaries of post offices at Sesser, Illinois (IV R, 77-78, 174; V R, 258); Bedford, Iowa (IV R, 84-85, 177; V R, 260); Hamburg, Iowa (IV R, 89-90, 184; V R, 244, 296, 307); Menahga, Minnesota (IV R, 95, 186); Bourbon, Missouri (IV R, 101-102, 189; V R, 262); and at Millstadt, Illinois (IV R, 105, 192; V R, 276-277). Co-defend-

ant Holland participated in the burglaries at Bourbon, Missouri, and Menahga, Minnesota (IV R, 186-192).

3. As part of its final charge the court instructed the jury as follows (VI R, 520):

> A separate offense is charged against each of the defendants in Count I of the indictment. This is important. They are each charged with a separate offense, and the defendant Miller is charged with separate and distinct offenses in each of Counts VI, VII, XV, and XVI. You must make a separate finding as to each defendant and each charge based only on the evidence pertaining to that defendant and that charge. The fact that you may find one defendant guilty or not guilty of the offense with which he is charged should not influence your verdict as to any other offense with which that defendant is charged, nor should it influence your verdict in any way as to any offense with which the other defendant is charged.

ARGUMENT

As noted above, the petition is out of time under Rule 22. At all events, the issues raised by petitioner do not warrant further review.

The trial court properly denied petitioner's motions for a severance of the conspiracy charge and the substantive charges relating to the Camdenton and Maryville burglaries. It is well settled that a conspiracy count may properly be joined with counts charging substantive offenses committed in the course of the conspiracy.[4] *Schaffer* v. *United States*, 362

[4] Petitioner does not press any claim that he was prejudiced by being tried jointly with Holland.

U.S. 511, 514; *Baker* v. *United States*, 393 F. 2d 604, 607 (C.A. 9), certiorari denied, 393 U.S. 836; *United States* v. *Hensley*, 374 F. 2d 341, 352 (C.A. 6), certiorari denied, 388 U.S. 923.

Petitioner argues that the evidence did not show that, when he agreed to join in the Camdenton burglary, he knew that he was joining a larger conspiracy and hence that he was prejudiced by having counts VI and VII, which depended on Christenson's testimony alone, tried with other counts where there was more corroboration. It is evident, however, from Christenson's testimony that petitioner knew that Christenson had been in post office robberies before and that after joining in the robbery, petitioner willingly accepted the arrangements previously made for disposal of the loot. Thus, at the time he joined the conspiracy he adopted the prior arrangements of his conspirators (see *Blumenthal* v. *United States*, 332 U.S. 539, 557) and he, thereafter, participated in a series of burglaries pursuant to that conspiracy. The various counts were therefore properly joined.

The instant case is clearly distinguishable from *Drew* v. *United States*, 331 F. 2d 85 (C.A.D.C.), and *Cross* v. *United States*, 335 F. 2d 987 (C.A.D.C.), where the charges joined for trial were not based upon acts or transactions constituting part of a common scheme or plan. Petitioner appears to argue, on the basis of *Cross*, that he wished to testify as to the Camdenton charges only but was unable to do so safely because of the other charges. Petitioner failed, however, to make such a claim in the district court.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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